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Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES M. OBERLY III, AND JOHN E. WILSON, III,
APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether application of the state noise control regulation at issue here to an interstate rail shipping facility is preempted by the Environmental Protection Agency's determination in 1982 that railroad facility regulations under the Noise Control Act of 1972, 42 U.S.C. (& Supp. II) 4901 *et seq.*, were unnecessary.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Wilsmere "intermodal" shipping facility, so termed because both rail and trucking operations are handled there, is a privately owned and operated railyard located in New Castle, Delaware, directly adjacent to a residential neighborhood. In addition to the noise associated with all railyards, intermodal facilities generate noise through operation of "piggyback" refrigeration units, known as trailers on flat cars (TOFCs), which can be transferred as a unit between truck-trailers and railroad flatcars. The noise results from the fact that the generators or compressors of the units operate continuously so that the units remain cold while awaiting further transport (J.S. App. A3).

Until recently, the Wilsmere facility was operated primarily as a rail switching yard. Beginning in late 1983, however, intermodal operations increased dramatically:

in the 8-month period ending July 31, 1984, the average number of refrigerated trailers at the facility was 30 per day, a figure that varied greatly on a seasonal basis, from a low of 1 per day in July to a high of 62 per day in May. J.S. App. A69 para. 7. Noise complaints by neighboring residents showed a parallel increase, prompting the Delaware Department of Natural Resources and Environmental Control (DNREC) to inform the owners of the Wilsmere facility in August 1984 that DNREC was preparing to file suit to seek injunctive relief for violations of the Delaware Noise Control Act and its implementing regulations. J.S. App. A54 para. 11. Specifically, Section 6.0.2 of the state noise regulations prohibits any source from emitting noise that "exceeds the ambient noise level by 10 dBa when measured at the point of complaint origination within the receiving property."[1] J.S. App. A49. Measurements taken by DNREC showed that the ambient noise level without the refrigerator units running was 52 dBa, while the level with the units running was 79 dBa (a total of 27 dBa of noise above the ambient levels). J.S. App. A94 paras. 12, 14.

2. Section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916, requires the Administrator of the Environmental Protection Agency (EPA) to promulgate noise emission regulations pertaining to the "operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad." Although there are no federal regulations governing noise emissions from TOFC equipment, noise emissions from other kinds of interstate rail carrier equipment are extensively regulated. 40 C.F.R. 201.11-201.16. EPA first issued rail regulations in 1976, when it promulgated a trio of regulations that governed locomotive operations under stationary and moving conditions, and rail car operations. At that time, EPA stated

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[1] "dBa" are decibels as measured by a particular methodology. Because the dBa scale is logarithmic, each increase of 10 decibels indicates a perceived doubling of sound.

that it had concluded that other types of equipment and facilities could best be regulated by state and local governments, because the problems they caused were primarily local in nature, and it appeared that such regulations would have no adverse effect on interstate commerce. 41 Feg. Reg. 2184, 2185 (1976).

The following year, however, the agency was directed to promulgate further standards. *Association of American Railroads* v. *Costle* (*AAR*), 562 F.2d 1310 (D.C. Cir. 1977). Resting its analysis in part on Section 17(c)'s preemption provision, the *AAR* court interpreted Section 17(a) as giving EPA no discretion in determining the scope of its duty to regulate. Instead, the court held that Section 17(a) obliged the agency to regulate all "equipment and facilities" as that term was customarily used in the interstate rail industry. Leaving in effect the three regulations previously promulgated by EPA, the court ordered the agency to promulgate additional regulations within a year.

Thereafter, EPA proposed a package of regulations covering retarders, refrigerator rail cars, and car coupling operations; the agency also proposed property-line standards limiting the total noise emitted by a railroad facility. 44 Fed. Reg. 22960 (1979).[2] The retarder and car-coupling standards were promulgated in final form on January 4, 1980. 45 Fed. Reg. 1252.[3] At that time, EPA stated that further time was needed to analyze the public comments on the proposed property-line standards; the agency also noted that public commenters had stated that refrigerator

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[2] The agency stated that the proposed "standards [would] meet the requirement of the Court order of providing comprehensive preemption." 44 Fed. Reg. 22961 (1979).

[3] EPA also promulgated standards for locomotive load cell test stands and switcher locomotives, which had not previously been proposed, but which had been discussed in the context of the prior proposal's property-line standard and on which public comments had been received.

cars were seldom being manufactured any longer, and questioned whether a refrigerator car standard was necessary. 45 Fed. Reg. 1258 (1980). As a result of these comments, the agency decided not to promulgate a source standard for refrigerator cars, "in part to allow time to evaluate the effect of their declining use" (*ibid.*). The agency observed that refrigerator cars were being replaced by TOFCs and that TOFCs had not been "addressed by EPA in the proposed rules" (*ibid.*). The agency stated that it expected to respond further to those comments in its promulgation scheduled for January 1981 (*ibid.*).

However, EPA did not proceed with the scheduled promulgation. Instead, on November 12, 1981, the parties to the *AAR* litigation filed with the court a "Status Report," stating that the agency had "concluded that no further standards are necessary to regulate rail facilities and equipment" (J.S. App. A78). After describing the additional equipment standards that already had been promulgated pursuant to the court's order, the report stated (J.S. App. A78-A79):

> the cumulative effect of these standards * * * effectively [is to] regulate both railroad equipment and railroad facilities. * * * Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish fur[t]her property line facility emission standards specifically for railyards.

An agreement to dismiss the appeal pursuant to Fed. R. App. P. 42 was submitted by the parties, and an order of dismissal was entered by the court on November 24, 1981.

EPA then published a Federal Register notice reflecting this agreement, in which it explained:

> The parties to the [*AAR*] case filed an agreement to dismiss on November 12, 1981, stating their belief

> that standards promulgated to date satisfied the Court's order.
>
> * * * * *
>
> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a larger proportion of the noise emissions from rail facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate, to a significant degree, noise emission from rail facilities, it was agreed by the AAR, the State of Illinois [as intervenor-defendant] and EPA that it is unnecessary for EPA to establish further property line facility emission standards.

47 Fed. Reg. 54107, 54108 (1982). Concluding that "the proposed standards are unnecessary," EPA withdrew both the proposed property line and refrigerator car standards (*ibid*).

3. Appellees filed this action for declaratory and injunctive relief when they were informed of the State's intention to take enforcement action against the Wilsmere facility.[4]

The district court granted a preliminary injunction, concluding that EPA had preempted the entire field of noise

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[4] In addition to alleging that Delaware's regulation, as applied, was preempted by the federal regulations, the complaint also alleged that the Delaware regulation as applied was an impermissible burden on interstate commerce in violation of the Commerce Clause, and that the Delaware Act and its implementing regulations were void for vagueness under the Fourteenth Amendment. Because of their rulings on preemption, the lower courts did not reach those issues. If the preemption determination now on appeal is reversed (either by this Court after noting probable jurisdiction or by the court below on remand if this Court vacates and remands for reconsideration), a fuller factual record on the Commerce Clause issue would be required before that issue could be addressed.

emissions from interstate rail carriers. The district court observed that regulatory preemption may occur even absent a directly applicable federal regulation, because a " 'federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.' " J.S. App. A8 (quoting *Arkansas Electric Coop* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original but not included by the district court)). The district court concluded that EPA's 1982 decision to withdraw its proposed refrigerator car and property-line standards constituted such a preemptive determination (J.S. App. A6-A8). Based on that withdrawal, the court concluded that the states were permanently precluded from implementing similar regulations, and thus enjoined Delaware from taking enforcement action against the Wilsmere facility. The court of appeals affirmed[5] in a short per curiam opinion adopting the reading of the district court (J.S. App. A18-A20).[6]

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[5] The appeal to the court of appeals was taken from the district court's entry of a preliminary injunction. At oral argument before the court of appeals, however, the parties informed the court that they did not contemplate putting on any additional evidence. The court requested the parties to stipulate that the court could review the matter "on the standards which one would evaluate a final injunction rather than a preliminary injunction," and the parties did so. J.S. App. A24.

[6] The court of appeals noted that in an amicus curiae filing made at the court's request, the Environmental Protection Agency agreed that the federal regulations preempt application of state noise regulations to the Wilsmere facility (J.S. App. A20). Regrettably, because of a failure of communication within the Department of Justice, that brief was filed in the court of appeals without having been brought to the attention of either the Assistant Attorney General for Land and Natural Resources or the Solicitor General, and therefore without the former's approval or the latter's authorization.

ARGUMENT

1. We consider first the statute and its legislative history in order to discern Congress's expectations as to the preemptive scope of federal regulations issued under Section 17. See *Wardair Canada* v. *Florida Dep't of Revenue,* No. 84-902 (June 18, 1986), slip op. 4 ("the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law"). On the basis of that consideration, we conclude that federal regulations under Section 17 were to have a narrow preemptive effect, preempting only state regulations that sought to regulate, directly or indirectly, the *same type* of equipment or facility. Contrary to the assumptions of the courts below, Congress did not intend federal regulations to have a blanket preemptive effect upon the entire field.[7]

a. The wording of Section 17(c) supports a narrow interpretation. Under that provision preemption occurs only *after* the "effective date of *a* regulation," and bars states from adopting "any standard" applicable to "the *same* equipment or facility * * * unless such standard is identical to *a* [federal] standard * * *." This language strongly suggests that each federal regulation, as it is enacted, bars *analogous* state regulations: it cannot reasonably be read as indicating that the adoption of any federal regulation—or the decision not to issue a regulation—bars all subsequent state efforts to regulate interstate rail carriers.[8]

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[7] Accordingly, at least insofar as the *AAR* decision was based on a different reading of the Section 17 preemption provision, we believe it was erroneous.

[8] The state should probably be preempted from indirectly, as well as directly, regulating equipment and facilities that are federally regulated. For example, if there were a federal TOFC noise regulation, the state would be preempted from enforcing a general property line noise regulation in a situation where the violation resulted from noise attributable to TOFCs that complied with the federal standard. Because there is no federal TOFC standard, however, it is unnecessary to consider here the extent of the indirect preemptive effect of federal noise regulations.

This narrow reading of Section 17(c) does not render it superfluous, although state regulations that are in actual conflict with federal regulations are automatically preempted by the Supremacy Clause, even in the absence of any preemption clause in the relevant federal statute (see, *e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 5). Section 17(c) significantly lowers the burden of establishing preemption. Under Section 17(c), all that need be established is that both state and federal regulations apply to the same type of equipment. It is not necessary, as it would be in the absence of Section 17(c), to assume the further burden of establishing that compliance with both sets of regulations is impossible, or that the local law obstructs the accomplishment of the objectives of the federal law. Cf. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983).

Similarly, the existence of the waiver provisions of Section 17(c)(2) is consistent with a narrow reading of the exemption provision; Congress in that subsection simply provided a procedure for permitting a state to enforce regulations that do overlap analogous federal regulations. See 118 Cong. Rec. 37318 (1972) (Sen. Tunney, bill sponsor, explains that waivers under 17(c)(2) would be appropriate "where local law requires lower speeds or different operating procedures, or modifications of routing").

b. The minimal legislative history of the preemption provision tends to support our interpretation. The authority for EPA to regulate noise emission from interstate carriers (and the associated preemption provision) was included in the original Senate bill (S. 3342, 92d Cong., 2d Sess. (1972)), not the original House bill (H.R. 11021, 92d Cong., 1st Sess. (1971)). After passage by the House, H.R. 11021 was sent to the Senate, which struck everything after the enacting clause and inserted in lieu thereof the text of S. 3342. H.R. 11021 then went back to the House, which likewise struck everything after the

enacting clause and substituted a compromise text that incorporated elements of both the original House and Senate bills. The Senate immediately acceded to the final House bill without further amendment and after very brief debate. Section 17 first appeared in its final form in the compromise House bill.

This Court has recognized (*City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 (1973)) that, in interpreting the Noise Control Act, "[t]he statements by Congressman Staggers and Senator Tunney are weighty ones." Unfortunately, those statements do not appear to be entirely consistent on this issue. We submit, however, that Senator Tunney's remarks in presenting the compromise House bill to the Senate are persuasive (118 Cong. Rec. 37318 (1972)):

> The purpose of the [interstate carrier] amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers.
>
> I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect.

This succinct explanation of the precise provision under consideration, identifying the nature of the congressional concern over federal-state conflicts, was presented to the Senate as the authoritative explanation of the provision that they promptly adopted. It is, therefore, entitled to very substantial weight as an indication of congressional intent.

In contrast, the House debates on the compromise bill contain no specific references to the new interstate carrier provision or its associated preemption and exemption provisions. In explaining his motivation for urging passage of

a federal noise control act, Representative Staggers simply remarked (118 Cong. Rec. 37083 (1972)):

> We have evidence that across America some cities and States are trying to pass noise regulations. Certainly we do not want that to happen.

This is hardly an authoritative interpretation of the scope of the particular preemption provision in the interstate carrier section of the bill. Indeed, Congressman Staggers could scarcely have been focusing on that provision, because it in fact *weakened* the Senate bill's original preemption provision:[9] The original Senate version provided for preemption, "after the effective date of [federal] regulations," of state or local standards "*respecting* noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce by railroad." In contrast, the House version (which was enacted) takes effect "after the effective date of *a* [federal] regulation" and preempts only state or local standards "applicable to noise emissions resulting from the operation of *the same* equipment or facility of *such* carrier." See App., *infra*, 1a.

2. The application of these general principles to the particular factual situation at issue in this case turns on the proper interpretation of the EPA's statements in 1982 that further standards, including property line regulations, were unnecessary.[10] EPA there determined that a property line regulation was unnecessary, because existing regulations adequately controlled the major railroad noise sources.

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[9] We have reproduced in the Appendix, *infra*, a comparison of the original Senate provision and the final House provision (which was enacted), with all distinctions identified.

[10] The state here apparently seeks to control only the increase in noise level at the Wilsmere facility resulting from the operation of the TOFCs (see page 2, *supra*). The federal standards apply to six types of railway equipment (40 C.F.R. 201.11-201.16), not including TOFCs. There is thus no existing analogous federal regulation.

As this Court has noted, "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 10. That approach, which reflects "the federal-state balance embodied in [the Court's] Supremacy Clause jurisprudence" (*ibid.*), leaves little room for equating a mere statement that a particular EPA regulation is "unnecessary" with a conclusion that the area involved must remain free of state regulation.

Instead, the agency's preemptive intent must be determined more specifically on the basis of its public statements. In its December 1982 *Federal Register* notice—its last pronouncement on the general subject of Section 17 regulations—EPA stated that the previously promulgated standards had addressed the major sources of noise from railyard operations, and observed that as a result "it was agreed [by the parties and intervenor to the *AAR* litigation] that it is unnecessary for EPA to establish further property line facility emission standards." 47 Fed. Reg. 54108 (1982). In that context, the agency had no need to, and did not, indicate that its conclusion that further standards were "unnecessary" was intended to preclude state or local regulation of types of equipment not subject to federal regulation. The agency's simple statement that it was withdrawing its proposed property line standard, in conjunction with the settlement and voluntary dismissal of the *AAR* litigation,[11] does not evince a clear intention to

[11] Because both parties agreed to the dismissal in *AAR*, the case was dismissed by the clerk of the court pursuant to Fed. R. App. P. 42; the agreement was not ratified by the court of appeals.

make the agency's regulations exclusive. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, slip op. 10.

Moreover, the particular litigation situation in which the federal regulations were considered and withdrawn further counsels against an assumption here that the agency's decision not to regulate implicitly determined that the area must remain unregulated by local authorities as well. See, *e.g.*, *Arkansas Elec. Coop.* v. *Arkansas Public Service Comm'n, supra.* The federal regulations were proposed here in response to a judicial directive, which issued after the court rejected the agency's contention that the area should be left to state regulation. See, *e.g.*, 41 Fed. Reg. 2184, 2185 (1976). In this peculiar context, the subsequent agency decision that these regulations were "unnecessary" scarcely has the force, for preemptive purposes, of the typical agency decision not to regulate.[12]

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[12] Nor is this a situation in which a pervasive federal regulatory presence leads naturally to the conclusion that any gaps in those regulations are an intentional part of a comprehensive federal regulatory system. Since the 1982 promulgations, EPA has undertaken little substantive activity in the area of noise control, although it recently revised a previously promulgated standard for heavy and medium trucks, in response to a petition from the industry. 51 Fed. Reg. 850 (1986) (granting a two-year delay in the effective date of the standards, but also making the standards more stringent when they do take effect). See also 49 Fed. Reg. 26738 (1984) (correcting minor inconsistencies in previously promulgated final rule); 48 Fed. Reg. 27039 (1983) (same). The agency currently has no plans to develop any additional noise control regulations and has not been given appropriations by Congress for that purpose.

CONCLUSION

Because the court of appeals may have relied on the position espoused by the government in that court, it should have the opportunity to reconsider the issue in light of the views we have here expressed.[13] Accordingly, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 1986

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[13] See also note 6, *supra*.

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APPENDIX A

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iage (Sec. 513):	House Language:
ling any other this *Act,* ctive date of nder this *part,*	*Subject to paragraph (2) but* notwithstanding any other provision of this *chapter,* after the effective date of *a* regulation[] under this *section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad,*
olitical hereof may adopt y standard ise emissions n the operation ent or facili*ties* rriers *engaged in* *mmerce by*	no State or political subdivision thereof may adopt or enforce any standard *applicable to* noise emissions resulting from the operation of *the same* equipment or facilit*y* of *such* carrier[]
tandard is standard noise emissions n such operation any regulation ction:	unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

Provided, however, That nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product *as* the Administrator, after consultation with the Secretary of Transportation *may* determine[] *to be*

necessitated by special local conditions *or* not in conflict with regulations promulgated under this *part*.

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